RJOAS: Russian Journal of Agricultural and Socio-Economic Sciences
ISSN 2226-1184 (Online) | Issue 6(150), June 2024

UDC 34

LEGAL PROTECTION FOR CUSTOMARY LAND OF INDIGENOUS PAPUA PEOPLE

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ABSTRACT
Papua is one of the provinces in Indonesia that has obtained special autonomy status based on Law Number 21 of 2001 concerning Special Autonomy for the Papuan People The granting of special autonomy is based on the consideration that the Indonesian government system according to the 1945 Constitution recognizes and respects units of regional government that are special or special in nature. Theoretically, the policy of granting special autonomy status to Papua Province will be effective in improving the welfare of the Papuan people. Because with special autonomy, the Papuan government and people have broader authority to regulate and manage their interests according to their own initiative, including regulating the utilization of Papua's natural resources for the prosperity and welfare of the Papuan people. This study is a normative legal research. Papua is a province in Indonesia that has the distinctiveness of indigenous peoples and their customary land rights, which until now continue to fight for recognition from the government. These efforts were responded to by the enactment of Law Number 21 of 2001 concerning Special Autonomy for the Papuan People, along with its amendments. The law is further elaborated through the Ulayat Rights Regional Regulation.

KEY WORDS
Legal study, protection, law, regulation, Papua.

Papua is one of the provinces in Indonesia that has obtained special autonomy status based on Law Number 21 of 2001 concerning Special Autonomy for the Papuan People The granting of special autonomy is based on the consideration that the Indonesian government system according to the 1945 Constitution recognizes and respects units of regional government that are special or special in nature. Theoretically, the policy of granting special autonomy status to Papua Province will be effective in improving the welfare of the Papuan people. Because with special autonomy, the Papuan government and people have broader authority to regulate and manage their interests according to their own initiative, including regulating the utilization of Papua's natural resources for the prosperity and welfare of the Papuan people [1].

The control of customary lands by the government is considered to have no clear legal basis. Because the indigenous Papuan people as the owners of customary rights feel that they have never released their customary rights to government institutions or agencies, or to anyone. Land tenure by the government is based on Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, that land and natural resources are controlled by the state, so that the government during the New Order era acted arbitrarily by controlling the customary lands of the indigenous Papuan people. Therefore, until now the indigenous Papuan people still want legal recognition and protection that has legal certainty over their customary land, especially in relation to capital expansion in the form of infrastructure development, which has resulted in their customary land being displaced, sago plantations being dissolved, and Papuan mothers no longer being able to cultivate sago. The research question is the legal protection of customary land as customary rights of indigenous Papuans after the enactment of the Papua Special Autonomy Law.

This study is a normative legal research [2].

Customary rights and individual rights to land in Indonesia are known by various names and characteristics in accordance with the socio-cultural conditions in each region [3]. The old adage that law exists because there is society, as Cicero said in a phrase *“ubi societas*

ibi ius". This expression also applies to indigenous peoples, which is illustrated in the expression that "customary rights exist because of the existence of indigenous peoples, and there is also a relationship between indigenous peoples and customary law and their customary rights". The relationship then gives the indigenous community the authority to carry out legal actions against their customary land. This authority includes: 1) regulate its use; 2) regulate and determine the legal relationship between people and their ulayat; and 3) regulate and determine the legal relationship between people and legal acts related to the ulayat [4].

The legal relationship between indigenous peoples and their customary land has existed for generations, which is impossible to separate. The existence of customary law communities in Indonesia is an undeniable necessity [5]. Van Vollenhoven states that customary law accepts many values of religious law, especially in areas that are very private and closely related to the belief system and the inner atmosphere of the community.[6] Related to customary land tenure, *Ter Haar in his book Beginselen en Stelsel van het Adatrecht* argues that there are 2 (two) types of control over land, namely lands controlled by the community, which are called land rights *(beschikkingsrecht),* which are popularly known as ulayat rights, and land controlled by individuals.

Remembering the communal nature of customary rights, any use, utilization, or release of customary land must obtain the joint consent of the customary community that controls the customary land. The release of customary land should be carried out by deliberation of the customary community, led by the customary leader. The deliberation of the adat community will determine whether or not the customary land is released. Therefore, there should be no takeover of customary lands by any party, including by the government, except with the consent of the local customary community.

The existence of indigenous peoples and customary law, along with their customary rights including customary rights, is the original right of the Indonesian people, which is still recognized and constitutionally guaranteed through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. -Customary land until now still exists and is recognized by the state as communal land, but the development of community civilization towards a modern legal order, the existence of indigenous peoples and their customary rights is increasingly weakening its existence. Customary land rights are often referred to as communal rights or collective rights. Communal rights in the discourse of human rights are included in the category of *groups rights* or collective rights. Communal rights are rights owned by customary law communities and are hereditary in nature. Its existence is highly dependent on the extent to which the indigenous community still recognizes and maintains it. In connection with that, in order to maintain the rights of indigenous peoples, especially customary rights, the presence of the state is needed, to provide a guarantee of recognition of the existence of these customary rights.

Recognition and protection of customary law communities and the customary land attached to them, is also contained in Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) which states:"in view of the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as according to reality they still exist, must be in such a way that it is in accordance with the national and state interests, which are based on national unity, and must not conflict with laws and other higher regulations".

Article 3 of the UUPA states "In view of the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of indigenous peoples, insofar as in reality they still exist, must be in such a way that it is in accordance with national and state interests, which are based on national unity, and must not conflict with laws and other higher regulations". Based on the provisions of the article, it can be stated that the state continues to provide legal protection to indigenous peoples and their customary rights, but it all depends on the extent to which indigenous peoples still maintain their customary laws and customary rights.

Papua is part of the territory of Indonesia, which is synonymous with customary law and customary rights. Until now, the existence of indigenous peoples and customary rights in

Papua is still recognized and protected by the state. Customary land rights are communal land rights, namely the common property rights of indigenous peoples, and on customary land the common rights of indigenous peoples are attached. The problem that arises in connection with the existence of customary rights as communal rights, is related to the proof of land rights of customary rights, as is the case with other land rights, such as property rights, business use rights, management rights and so on.

Problems that arise related to the existence of communally controlled lands by indigenous peoples, generally do not have legal evidence of ownership of communally owned communal lands. The absence of ownership certificates over communal lands causes communal lands to be easily controlled by other parties, especially the government by arguing that all land in Indonesia, including communal lands, is land under the control of the state based on Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

According to *Black's Law Dictionary*, *"protection* is *the act of protecting."* (*Bryan A. Garner, Black's Law Dictionary*, ninth edition, St. Paul, West, 2009, p. 1343). Philipus M. Hadjon, divides legal protection into two, namely preventive protection and repressive legal protection. In the opinion of Phillipus M. Hadjon "that legal protection for the people as a preventive and repressive government action"

Referring to the opinion of Philipius M. Hadjon, it can be said that repressive legal protection is aimed at resolving problems and disputes that occur. Legal protection against the actions of the authorities is based on the concept of recognition and protection of human rights. The concept of recognition and protection of human rights aims to provide limits and impose obligations on society and the state [7]. The essence of legal protection from Philipus M Hadjon, that legal protection is directed at protecting the people from arbitrary government action.

Preventively, legal protection of the customary rights of indigenous Papuans has actually been stated in Article 1 point 21 of Law Number 2 of 2021 concerning the Second Amendment to Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua, which states, that: "ulayat rights are communal rights owned by certain customary law communities over a certain area which is the living environment of its citizens, which includes the right to utilize land, forests, and water and their contents in accordance with statutory regulations. Furthermore, Article 1 point 18 explains that Papuan indigenous people are indigenous Papuans who live in an area and are bound and subject to certain customs with a high sense of solidarity among its members, and Article 1 point 19 explains that Customary Law is an unwritten rule or norm that lives in a customary law community that regulates, binds and is maintained, and has sanctions. The statements contained in some of these articles are actually indirectly a form of preventive legal protection for the indigenous Papuan people and the customary lands they control.

Efforts to emphasize and strengthen the existence of indigenous Papuans and their customary land rights are reaffirmed in Article 43 of Law Number 21 of 2001 concerning Special Autonomy for Papua Province, which stipulates that:

1. The Papua Provincial Government is obliged to recognize, respect, protect, empower and develop the rights of indigenous peoples based on the provisions of applicable laws and regulations;
2. The rights of indigenous peoples referred to in paragraph (1) include the customary rights of the indigenous law community and the individual rights of the members of the indigenous law community concerned;
3. The implementation of customary rights, insofar as in reality they still exist, shall be carried out by the customary ruler of the customary law community concerned in accordance with the provisions of local customary law, with respect for land tenure of former customary rights legally acquired by other parties in accordance with the procedures and based on statutory regulations;
4. The provision of communal land and individual land of indigenous people for any purpose shall be carried out through deliberations with the indigenous people and the people concerned to obtain an agreement on the transfer of the land required and the compensation;

5. The Provincial, Regency / City Governments provide active mediation in an effort to resolve disputes over customary land and former individual rights fairly and wisely, so that an agreement can be reached that satisfy the parties concerned.

The elucidation of Article 43 paragraph (1) emphasizes that ulayat rights are the collective rights of the members of the customary law community concerned. The subjects of ulayat rights are certain customary law communities, not individuals, and also not customary rulers, although many of them serve for generations. Customary rulers are the executors of customary rights who act as officers of their customary law communities in managing customary rights in their areas.

Based on this explanation, in principle, customary rights are regulated by customary law in accordance with the wishes of the customary law community concerned. As is known, until now the existence of customary rights in Papua has manifested itself in various communities and their diverse customary laws. Papuan society and customary law continue to dynamically adjust to the social and economic development of society, which is influenced by the development of civilization originating from outside the environment of the customary law community. However, indigenous peoples and their customary rights are still recognized by national land law (UUPA), as long as in reality they still exist, and if the customary rights no longer exist or are dead, then the customary rights will not be revived.

Article 43 of Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua, legally has provided legitimacy for the recognition of Papua Provincial Government of the customary law communities in Papua, because the provisions of the article are clearly a legal statement from state institutions whose essence is the people's representatives (DPR) together with the government, so that the law is juridically strong evidence of legal recognition and protection of indigenous Papuans and their customary rights. However, it must be recognized that in reality the legal recognition and protection of indigenous peoples and their customary rights, especially in the perspective of norms, is unclear and incomplete. Vagueness and incompleteness to date are still often the cause of conflicts related to customary rights among members of the Papuan indigenous community, between the Papuan indigenous community and the Government, as well as between the Papuan community and private parties who need land.

Efforts to realize legal certainty for the existence of customary rights of indigenous Papuans have continued since 2008, especially with the issuance of the Papua Province Special Regional Regulation Number 23 of 2008 concerning Customary Law Communities' Ulayat Rights and Individual Rights of Indigenous People on Land (hereinafter referred to as the Ulayat Rights Regional Regulation). The purpose of the issuance of the Perda Ulayat Rights is actually a form of recognition and protection from the Papua Provincial Government of the ulayat rights of indigenous peoples. The Perda on Customary Rights is expected to provide a sense of security and certainty for indigenous Papuans in controlling their customary lands. Juridically, the Perda on Customary Rights does provide opportunities for indigenous peoples to be actively involved in development in Papua. However, juridically, the Perda on Customary Rights has many weaknesses related to the existence of indigenous Papuans and the existence of their customary rights.

The weakness can be seen in several articles that tend to harm indigenous peoples and their customary rights. Some provisions in the Perda on Customary Rights seem to position the existence of indigenous Papuans and their rights as something that must receive protection from the Papua Provincial Government. Furthermore, regarding the problematic articles, among others, Article 3 of the Special Regional Regulation of Papua Province Number 23 of 2008 states that:

1. The existence of customary rights of indigenous peoples and/or individual rights of indigenous peoples over land shall be based on the results of research in regencies/municipalities in the region.
2. Research to determine the existence or non-existence of customary law community ulayat rights and/or individual rights of customary law community members over land in the Regency/City area shall be conducted by a research committee consisting of:
    - Experts in customary law;

- Customary institutions/customary elders or customary rulers who are authorized over customary rights and or individual rights of citizens of the customary law community concerned;
- Non-governmental organizations;
- Officials from the national land agency of the republic of Indonesia;
- Officials from the legal section of the regent/mayor's office;
- Officials from forestry agencies and mining agencies;
- Officials from other relevant agencies.

3. The research committee as referred to in paragraph (2) shall conduct research on the territory of certain indigenous peoples in accordance with that stipulated by the Regency/City Government;
4. The composition of the research committee membership as referred to in paragraph (2) and the area to be researched as referred to in paragraph (3) shall be stipulated by a Regent/Mayor Decree;
5. The composition of the membership of the research committee as referred to in paragraph (2) and the area to be researched covering cross regencies/cities shall be stipulated by a Governor Decree.

At present, development in Papua Province continues to catch up with other provinces. Development requires land as its basic capital. The fulfillment of land needs is often the cause of land conflicts between the community and the government and also with private parties who need land. The causes of land conflicts are mostly caused by the determination of the Regional Head / Governor / Regent, Mayor related to the existence of customary rights of indigenous peoples, as well as the determination of the area of customary rights. The determination of customary rights and their boundaries is vulnerable to abuse by government officials, with the aim of benefiting other parties who need customary land. These problems are not in line with the provisions in Article 43 paragraph (3) of the Special Autonomy Law which states that, the implementation of customary rights is carried out by the indigenous community concerned according to the provisions of local customary law.

Another interesting point is the provision of Article 3 paragraph (2) letter b of the Ulayat Rights Regional Regulation, specifically regarding the existence of “customary institutions/customary elders or customary rulers”.There are no clear rules regarding the existence of these customary institutions. The existence of customary institutions in the Perda on Customary Rights is not explained in detail regarding who the customary institutions are, the legality of customary institutions, the authority and role of customary institutions related to the issue of customary rights of indigenous peoples in Papua. The existence of customary institutions has also not been regulated in Law Number 21 of 2001 concerning Special Autonomy for the Papuan People, and is only mentioned implicitly in Article 34 paragraph (3) letter e number 1 part b, which states that general revenue is equivalent to 1% (one percent) of the national General Allocation Fund ceiling which is intended for “improving the welfare of indigenous Papuans and strengthening customary institutions”.

The article does state the strengthening of customary institutions, but these customary institutions are not given further explicit regulation. If the purpose of the Perda on Customary Rights is to provide strengthening and legal protection of the customary rights of indigenous Papuans, the Perda on Customary Rights should place customary institutions in a firm and clear regulatory portion. This is because in customary law communities the existence of customary institutions as customary institutions has an important role in maintaining and developing customary law. In addition, the Perda on Customary Rights emphasizes the position, duties, and functions of customary institutions in maintaining, defending, and preserving the existence of indigenous peoples and their customary rights.

CONCLUSION

Papua is a province in Indonesia that has the distinctiveness of indigenous peoples and their customary land rights, which until now continue to fight for recognition from the

government. These efforts were responded to by the enactment of Law Number 21 of 2001 concerning Special Autonomy for the Papuan People, along with its amendments. The law is further elaborated through the Ulayat Rights Regional Regulation. The regulation has indeed emphasized the recognition of the existence of customary institutions, which can play a role in fighting for, defending and preserving indigenous Papuans and their customary rights. The Perda on Customary Rights should be able to accommodate the reality of indigenous peoples. The Perda on Customary Rights as an elaboration of the law, should be able to translate the legislators, in implementing the meaning of strengthening customary institutions as specified in the Special Autonomy Law for the Papuan People. The Perda on Customary Rights should provide strengthened authority to customary institutions in championing the existence of indigenous peoples and institutions as long as it does not conflict with national interests.

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